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From: Presidency
To: Working Group on Information Exchange and Data Protection (DAPIX)
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Subject: Proposal for a Regulation of the European Parliament and of the Council
on the protection of individuals with regard to the processing of personal
data and on the free movement of such data (General Data Protection
Regulation)
- Chapter VIII

1. Further to the DAPIX meetings of 23-24 and 30-31 March 2015, the Presidency has revised the text of Chapter VIII. Regarding two of the main questions on this Chapter, delegations are invited to discuss the below questions.

Liability

2. The proposed text on liability for data protection violations (Article 77 - Right to compensation and liability) has given rise to a detailed discussion. At the heart of the discussion is the question from whom the data subject which claims to have suffered damages as a result of a data protection violation, may seek compensation.

3. As most of the obligations in the Regulation, in particular in Chapter IV (obligations of controllers and processors) rest with controllers, there appears to be a large consensus among Member States that in practice the controllers will be primarily liable for damages suffered as a consequence of data protection violations. Where more than one controller and/or a processor is involved in a data processing operation, the question is whether and to what extent the data subject can claim damages from these other controllers and/or processors.
4. The text of Chapter III contains little guidance in this regard. Paragraph 2 of Article 24 provides that, in case of joint controllers, the data subject may, irrespective of the terms of the arrangement among the controllers, exercise his rights under the Regulation in respect of each of the controllers. This paragraph (which at any rate does not apply in case the data subject has been informed in a transparent and unequivocal manner which of the joint controllers is responsible: Article 24(3)), however, appears to address only the question of the exercise of data protection rights by data subjects. It does not appear to cover the right to receive compensation in case of violations. The only rule on liability laid down by the provision on processors is that a processor cannot escape its liability by enlisting another processor (Article 26(2a)). As a matter of fact the question of liability of processors was deliberately deferred to the discussion on Article 77.
5. A first question is therefore whether Chapter VIII should explicitly distinguish the cases in which controllers and processors can be held liable, or whether this should be left to the courts (which will obviously have to base themselves on the rules of the Regulation). Both DE and FR have made proposals to clarify in an exhaustive manner, either in recital 118 and/or in Article 77, the cases in which a processor may be held liable. They essentially posit that the processor can be held liable only in two cases: (i) when he violates one of the provisions of the Regulation specifically addressed to processors (failure to ensure a level of security appropriate to the risks involved by the processing (Article 30(1)); failure to notify a personal data breach to the controller (Article 31(2)) or violations of the rules on international transfers pursuant to Chapter V); and (ii) when acting beyond that contract or other legal act with the controller (Article 26(2)).

6. *Delegations are therefore invited to indicate whether they:*
- a) *favour the clarification in an exhaustive manner of the cases in which a processor may be held liable;*
 - b) *agree with the two types of cases envisaged by DE and FR; and*
 - c) *think this should be clarified in the text of Article 77 or a clarification in recital 118 suffices.*
7. The second question is how the Regulation should deal with the possible cumulative liability claims against controllers and/or processors involved in a processing operation. Three different options can be envisaged:
- Option 1 (presumption of joint and several liability)***
8. The Commission proposal, on which the latest Presidency text built, provides for joint and several liability of each controller and/or processor involved in the processing operation for the entire amount of the damage. Paragraph 3, however, provides that a controller or processor may be exempted from this liability if he demonstrates that he is not responsible for the damage. The joint and several liability proposed by the Commission can thus be interpreted as a presumption, which can be rebutted by any actor involved in the processing operation.
- Option 2 ("full" joint and several liability)***
9. In a proper system of joint and several liability, the claimant may recover all the damages from any of the persons involved in conduct which gave rise to damages regardless of their individual share of the liability. Under such a system, the question to which extent each of the controllers and/or processors is liable comes in only after one of the controllers and/or processors has been convicted for the entire amount of damages. He would then have the possibility to claim back from the other controllers and/or processors an amount corresponding to their share of the liability. Should delegations prefer such system, paragraph 3 would obviously need to be amended. A proposal for an alternative paragraph 3 is set out in the annex.

Option 3 ('liability-follows-fault')

10. The UK delegation has advocated the 'liability-follows-fault' principle under which a processor and/or controller) can be held liable only if it has committed a fault. The compensation that a court could order against a processor or controller should only be for the amount corresponding to its fault. According to the UK delegation, this also corresponds to the philosophy underlying the 1995 Data Protection Directive. Article 23, paragraph 2 of that Directive provides that 'the controller may be exempted from this liability, in whole or in part, if he proves that he is not responsible for the event giving rise to the damage'. The UK proposal is set out in the annex as an alternative to paragraph 2 of Article 77.
11. In its written contribution the UK delegations has marshalled several arguments against the proposed system of joint and several liability, notably that it allegedly does not necessarily lead to quick compensation for the data subject; the parties truly at fault may continue without being held to account; risk-sharing may incentivize further risky practices and blameless parties may suffer reputational damage that will have negative consequences for their business and the processing market in the European Union .
12. *Delegations are invited to indicate which of the above options they prefer.*

Sanctions

13. At least the following three issues regarding sanctions demand further discussion: (i) the possibility for Member States to have other penalties next to, or instead of, administrative fines; (ii) the question whether fines should be imposed only for intentional or also for negligent violations of the Regulation; and (iii) the amount of the fines.

Other penalties next to, or instead of, administrative fines

14. In line with standard EU legislative practice and the ECJ case law, the initial Commission proposal contained a clause (Article 78) demanding that Member States shall lay down the rules on penalties applicable to infringements of the provisions of this Regulation and that such penalties shall be effective, proportionate and dissuasive. This clause (currently Article 79b) does not require Member States to lay down criminal sanctions, but merely that the sanctions - criminal or other - be effective, proportionate and dissuasive. This is basically a general requirement that Member States provide for an effective enforcement of the Regulation. By no means is it aimed at harmonising criminal sanctions.

15. Article 79b has been amended in an attempt to clarify that it is primarily aimed at infringements not listed in Article 79a (mainly those under national law, referred to in Chapter IX, e.g. infringements in employment law and relating to freedom of expression). In that way Article 79b is complementary to the list in Article 79; it does not require but neither excludes other penalties for the violations for which the Regulation provides administrative fines.
16. At least one Member State (DK) has constitutional problems which preclude it from providing administrative fines to be imposed by an administrative authority (in this case the DPA). In order to address this problem, while at the same time maintaining the level of harmonisation of fines provided for by Article 79a, the Presidency has proposed an alternative in paragraph 5 of that Article. *Member States are invited to indicate whether they agree with the above proposals.*

Fines only for intentional or also for negligent violations of the Regulation

17. The Commission proposal provides administrative fines both for intentional and negligent violations of the Regulation. In the level of fines (the "fork") available to DPAs it does not distinguish between intentional or negligent violations but Article 79, paragraph 2a lists the intentional or negligent character of the infringement as one of the elements to be taken into account in deciding whether or not to impose the fine, as well as for the determination of the amount of the fine.
18. Some Member States are concerned about the inclusion of negligent violations. In case Member States share this concern, there are several possible ways of dealing with it:
- a) total exclusion of negligent violations from the description of violations in Article 79a;*
 - b) distinguishing negligent from intentional violations by lowering the maximum level of fines to be imposed; or*
 - c) providing in a more explicit manner in which way the negligent character of a violation should be taken into account (e.g. by lowering the fine with 1/3).*

Level of fines

19. The Commission proposal provides for very hefty administrative fines both for intentional and negligent violations of the Regulation. It distinguishes three groups of violations with three different levels of fines (the "fork") available to the DPA. *Member States are invited to indicate whether they agree with the way in which the different violations have been categorised into the three different groups.*
20. The level of fines has been left open by previous Presidencies for further discussion. *Delegations are invited to indicate whether they:*
- a) accept the or want to lower the level of fines proposed by the Commission;*
 - b) in case they want to lower the level of fines proposed by the Commission, provide the Presidency with a broad indication of how much they want to lower the level of fines (one third lower, half lower, etc.).*
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111) Every data subject should have the right to lodge a complaint with a supervisory authority, in particular in the Member State of his or her habitual residence , and have the right to an effective judicial remedy in accordance with Article 47 of the Charter of Fundamental Rights if the data subject considers that his or her rights under this Regulation are infringed or where the supervisory authority does not act on a complaint, partially or wholly rejects or dismisses a complaint or does not act where such action is necessary to protect the rights of the data subject. The investigation following a complaint should be carried out, subject to judicial review, to the extent that is appropriate in the specific case. The supervisory authority should inform the data subject of the progress and the outcome of the complaint within a reasonable period. If the case requires further investigation or coordination with another supervisory authority, intermediate information should be given to the data subject. In order to facilitate the submission of complaints, each supervisory authority should take measures such as providing a complaint submission form which can be completed also electronically, without excluding other means of communication.

112) Where a data subject considers that his or her rights under this Regulation are infringed, he or she should have the right to mandate a body, organisation or association which aims to protect the rights and interests of data subjects in relation to the protection of their data and is constituted according to the law of a Member State, to lodge a complaint on his or her behalf with a supervisory authority or exercise the right to a judicial remedy on behalf of data subjects. Such a body, organisation or association should have the right to lodge, independently of a data subject's complaint, a complaint where it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.

113) Any natural or legal person has the right to bring an action for annulment of decisions of the European Data Protection Board before the Court of Justice of the European Union (the "Court of Justice") under the conditions provided for in Article 263 TFEU. As addressees of such decisions, the concerned supervisory authorities who wish to challenge them, have to bring action within two months of their notification to them, in accordance with Article 263 TFEU. Where decisions of the European Data Protection Board are of direct and individual concern to a controller, processor or the complainant, the latter may bring an action for annulment against those decisions and they should do so within two months of their publication on the website of the European Data Protection Board, in accordance with Article 263 TFEU. Without prejudice to this right under Article 263 TFEU, each natural or legal person should have an effective judicial remedy before the competent national court against a decision of a supervisory authority which produces legal effects concerning this person. Such a decision concerns in particular the exercise of investigative, corrective and authorisation powers by the supervisory authority or the dismissal or rejection of complaints¹. However, this right does not encompass other measures of supervisory authorities which are not legally binding, such as opinions issued by or advice provided by the supervisory authority. Proceedings against a supervisory authority should be brought before the courts of the Member State where the supervisory authority is established and should be conducted in accordance with the national procedural law of that Member State. Those courts should exercise full jurisdiction which should include jurisdiction to examine all questions of fact and law relevant to the dispute before it. Where a complaint has been rejected or dismissed by a supervisory authority, the complainant may bring proceedings to the courts in the same Member State. In the context of judicial remedies relating to the application of this Regulation, national courts which consider a decision on the question necessary to enable them to give judgment, may, or in the case provided for in Article 267 TFEU, must, request the Court of Justice to give a preliminary ruling on the interpretation of Union law including this Regulation.

¹ GR reservation.

Furthermore, where a decision of a supervisory authority implementing a decision of the European Data Protection Board is challenged before a national court and the validity of the decision of the European Data Protection Board is at issue, that national court does not have the power to declare the European Data Protection Board's decision invalid but must refer the question of validity to the Court of Justice in accordance with Article 267 TFEU as interpreted by the Court of Justice in the *Foto-frost* case², whenever it considers the decision invalid. However, a national court may not refer a question on the validity of the decision of the European Data Protection Board at the request of a natural or legal person which had the opportunity to bring an action for annulment of that decision, in particular if it was directly and individually concerned by that decision, but had not done so within the period laid down by Article 263 TFEU.

114) (...)

115) (...)

116) For proceedings against a controller or processor, the plaintiff should have the choice to bring the action before the courts of the Member States where the controller or processor has an establishment or where the data subject resides, unless the controller is a public authority acting in the exercise of its public powers.

117) (...).

² Case C-314/85

118) Any damage which a person may suffer as a result of unlawful processing should be compensated by the controller or processor, who **should** be exempted from liability if they prove that they are not responsible for the damage, in particular where he establishes fault on the part of the data subject or in case of force majeure. The concept of damage should be broadly interpreted in the light of the case law of the Court of Justice of the European Union in a manner which fully reflects the objectives of this Regulation. This is without prejudice to any claims for damage deriving from the violation of other rules in Union or Member State law³. [The processor should not be exempted if the damage results, in whole or in part, either from the fact that he has not complied with the instructions of the controller or from a personal data breach on his part⁴].

118a) Where specific rules on jurisdiction are contained in this Regulation, in particular as regards proceedings seeking a judicial remedy including compensation, against a controller or processor, general jurisdiction rules such as those of Regulation No 1215/2012 should not prejudice the application of such specific rules⁵.

118b) In order to strengthen the enforcement of the rules of this Regulation, penalties and administrative fines⁶ may be imposed for any infringement of the Regulation, in addition to, or instead of appropriate measures imposed by the supervisory authority pursuant to this Regulation. In a case of a minor infringement or if the fine likely to be imposed would constitute an disproportionate burden to a natural person, a reprimand may be issued instead of a fines. Due regard should however be given to the intentional character of the infringement, to the previous infringements or any other factor referred to in paragraph 2a.⁷ The imposition of penalties and administrative fines should be subject to adequate procedural safeguards in conformity with general principles of Union law and the Charter of Fundamental Rights, including effective judicial protection and due process.

³ COM scrutiny reservation.

⁴ Further to FR proposal. IE was opposed to the processor being held liable for not following instructions of the controller

⁵ COM and DE scrutiny reservation.

⁶ DK reservation on the introduction of administrative fines in the text as administrative fines – irrespective of their level – raise constitutional concerns.

⁷ Further to FI proposal.

119) Member States may lay down the rules on criminal sanctions for infringements of this Regulation, including for infringements of national rules adopted pursuant to and within the limits of this Regulation. These criminal sanctions may also allow for the deprivation of the profits obtained through infringements of this Regulation. However, the imposition of criminal sanctions for infringements of such national rules and of administrative sanctions should not lead to the breach of the principle of *ne bis in idem*, as interpreted by the Court of Justice.

120) In order to strengthen and harmonise administrative **penalties** against infringements of this Regulation, each supervisory authority should have the power to impose administrative fines. This Regulation should indicate offences, the upper limit and criteria for fixing the related administrative fines, which should be determined by the competent supervisory authority in each individual case, taking into account all relevant circumstances of the specific situation, with due regard in particular to the nature, gravity and duration of the breach and of its consequences and the measures taken to ensure compliance with the obligations under the Regulation and to prevent or mitigate the consequences of the infringement. **Where the fines are imposed on persons that are not a commercial undertaking, the supervisory authority should take account of the general level of income in the Member State in considering the appropriate amount of fine**⁸. The consistency mechanism may also be used to promote a consistent application of administrative sanctions. It should be for the Member States to determine whether and to which extent public authorities should be subject to administrative fines. Imposing an administrative fine or giving a warning does not affect the application of other powers of the supervisory authorities or of other sanctions under the Regulation.

120a) Where this Regulation does not harmonise administrative penalties or where necessary in other cases, for example in cases of serious infringements of the Regulation, Member States should implement a system which provides for effective, proportionate and dissuasive penalties. The nature of such penalties (criminal or administrative) should be determined by national law.

⁸ Further to CZ proposal.

CHAPTER VIII

REMEDIES, LIABILITY AND SANCTIONS⁹

Article 73

Right to lodge a complaint with a supervisory authority¹⁰

1. Without prejudice to any other administrative or judicial remedy, every data subject shall have the right to lodge a complaint with a single supervisory authority, in particular¹¹ in the Member State of his or her habitual residence, place of work or place of the alleged infringement, if the data subject considers that the processing of personal data relating to him or her does not comply with this Regulation¹².
2. (...)
3. (...)
4. (...)
5. The supervisory authority to which the complaint has been lodged shall inform the complainant on the progress and the outcome of the complaint including the possibility of a judicial remedy pursuant to Article 74¹³ (...).¹⁴

⁹ AT, FR, EE, ES and RO scrutiny reservation.

¹⁰ CY, CZ, IE, LY, PT and SI scrutiny reservation.

¹¹ COM, BG, IT and LU though that the data subject should be able to lodge a complaint with any DPA without limitation since the protection of personal data was a fundamental right.
¹² DE, supported by NL, suggested adding "when its rights are not being respected".

¹³ NL and FR scrutiny reservation. Article 54c (2) already provides for a general duty for the supervisory authority with which a complaint has been lodged to notify the data subject of any measures taken (i.e. the scenario of a 'positive' reply by the DPA).

¹⁴ IE asked why the reference to Article 76b was deleted.

Article 74

Right to an effective judicial remedy against a supervisory authority¹⁵

1. Without prejudice to any other administrative or non-judicial remedy, each natural or legal person shall have the right to an effective judicial remedy against a legally binding decision of a supervisory authority concerning them.¹⁶.
2. Without prejudice to any other administrative or non-judicial remedy, each data subject shall have the right to **an effective** judicial remedy where the supervisory authority competent in accordance with Article 51¹⁷ does not deal with a complaint or does not inform the data subject¹⁸ within three months or any shorter period provided under Union or Member State law¹⁹ on the progress or outcome of the complaint lodged under Article 73²⁰.
3. (...) **P**roceedings against a (...) supervisory authority shall be brought before the courts of the Member State where the supervisory authority is established.
- 3a. Where proceedings are brought against a decision of a supervisory authority which was preceded by an opinion or a decision of the European Data Protection Board in the consistency mechanism, the supervisory authority shall forward that opinion or decision to the court.

¹⁵ ES, PT and SI reservation. IT and UK scrutiny reservation.

¹⁶ DE, supported by CZ, IE and SE, suggested adding: 'by which it is adversely affected'. FI thought that *concerning them* was too vague and suggested *addressed to them or*: (drafting is taken from Article 263 TFEU). However this criterion for ECJ litigation may not be necessarily be valid for remedies before national courts, the admissibility of which will be determined by national law.

¹⁷ COM reservation.

¹⁸ FI and SE indicated that the right to a judicial remedy if an authority did not take action was unknown in their legal system.

¹⁹ SI indicated that under its law the DPA was obliged to reply within two months.

²⁰ SE scrutiny reservation. BE reservation. BE said that there was a link to Article 53 and the main establishment and the DPA of the habitual residence. Support from NL. IT thought that paragraphs 1 and 2 overlapped. NO wanted to delete paragraph 2 since a court review would endanger the independency of the DPA.

4. (...)
5. (...)²¹

Article 75

Right to an effective judicial remedy against a controller or processor²²

1. Without prejudice to any available administrative or non-judicial remedy²³, including the right to lodge a complaint with a supervisory authority under Article 73, data subjects shall have the right to an effective judicial remedy if they consider that their rights under this Regulation have been infringed as a result of the processing of their personal data in non-compliance with this Regulation.²⁴
2. Proceedings against a controller or a processor shall be brought before the courts of the Member State where the controller or processor has an establishment (...)²⁵. Alternatively, such proceedings may be brought before the courts of the Member State where the data subject has his or her habitual residence, unless the controller or processor is a public authority acting in the exercise of its public powers.²⁶
3. (...)
4. (...)

²¹ COM reservation on deletion of paragraphs 4 and 5. DE scrutiny reservation on deletion of paragraphs 4 and 5.

²² DE, PL, PT, SI and SK scrutiny reservation. ES, IT reservation.

²³ SI wanted to delete *non-judicial remedy*.

²⁴ AT said that the possibility of parallel proceedings about the same object was not provided under its legal system and proposed to limit the possibility of a judicial remedy to cases where the DPA cannot take a decision. FR thought that it was necessary to clarify that the processor might be responsible independently of the controller, *e.g.* pursuant to Article 30 or according to a certification.

²⁵ In view of the concerns raised, the reference to national law has been kept only in recital 113.

²⁶ UK scrutiny reservation: found the second part of the paragraph unusual.

Representation of data subjects

1. The data subject shall have the right to mandate a body, organisation or association, which has been properly constituted according to the law of a Member State and whose statutory objectives include the protection of data subjects' rights and freedoms with regard to the protection of their personal data,²⁸ to lodge the complaint on his or her behalf²⁹ and to exercise the rights referred to in Articles 73, 74 and 75 on his or her behalf³⁰.
- 1a. [Independently of a data subject's mandate or complaint, any body, organisation or association referred to in paragraph 1³¹ shall have the right to lodge a complaint with the supervisory authority competent in accordance with Article 51³² if it has reasons to consider that a personal data breach referred to in Article 32(1) has occurred and Article 32(3) does not apply.³³]

²⁷ DE, ES, PT, RO and SI scrutiny reservation. CZ, EE, IT, NL, SI and UK thought this article was superfluous.

²⁸ COM said that consumer organisations and data protection organisations enhance fundamental rights so it was important that they could lodge complaints.

²⁹ IT scrutiny reservation.

³⁰ DE parliamentary reservation; EE reservation and IT scrutiny reservation. EE, supported by SE, thought that the data subject could choose anybody to represent her/him so this drafting was a limitation so a reference to national law was needed. Support from SE.

³¹ PL asked how an organisation could know about a breach. PT did not want to exclude the possibility of an organisation to lodge complaint if that was provided in national law but meant that the wording was not clear.

³² COM reservation on limitation to competent supervisory authority.

³³ This paragraph was moved from Article 73(3). BE, EE and HR reservation. BG, CZ, DK, LU, NL, SE and UK scrutiny reservation. UK in particular queried whether such possibility would also be open to an association when the data subject itself considered that the reply he/she had received was satisfactory. ES on the contrary thought that this possibility should not be limited to data breaches. For CZ, DK, PL, SE and UK it was not acceptable that an organisation etc. had an independent right to lodge a complaint. PL thought that such right could lead to abuse and therefore wanted to delete the paragraph. IE wanted it clarified in a recital that class action was not allowed. LU also raised doubts about paragraph 1a and indicated that the Commission had issued a Recommendation on class action in June 2013 wherein safeguards were set out. COM found that paragraph 1a was superfluous but said that the added value was that an organisation that had been recognised in one MS could mandate such an organisation in another MS.

2. [Member States may provide adequate and effective legal remedies for any body, organization or association referred to in paragraph 1 independently of a data subject's mandate or complaint to act against a controller or processor violating its obligations under this regulation³⁴].

3. (...)

4. (...)³⁵

Article 76a

Suspension of proceedings³⁶

1. Where a competent court of a Member State has **information on** proceedings concerning the same processing activities are pending in a court in another Member State, it shall³⁷ contact that court in the other Member State to confirm the existence of such proceedings.

2. Where proceedings involving the same processing activities are pending in a court in another Member State, any competent court other than the court first seized may suspend³⁸ its proceedings.

³⁴ Inspired by DE and FR proposals.

³⁵ COM scrutiny reservation on deletion of paragraphs 3 to 5. FR reservation on the deletion of paragraphs 3 to 4.

³⁶ AT, BE, CY, DK, EE, ES, FI, FR, IT, NL, PL, PT, SE and SI scrutiny reservation. PL, supported by FI, wanted it to be explained what *same processing activities* meant: same scope or also related cases. ES thought that *lis pendens* necessitated the same persons, same proceeding, same object of dispute and same claim and that that could be difficult to establish. UK, supported by FR, cautioned against having a too prescriptive text, support from FR SE thought that GDPR should not regulate *lis pendens*, instead it should be up to the DPA and MS courts to decide. NO and FR asked how this text related to Regulation No 44/2001 and the Lugano Convention FI considered that it was necessary to have rules on this question in GDPR.

³⁷ LU supported by EL, suggested to replace "shall" with "may".

³⁸ NL, PL and SK thought that it was difficult to force courts to stay proceedings waiting for another court to decide. NL, supported by HU and SK, asked how it was possible for a court to know that another case was going on elsewhere. HU asked how it would be established which court was first seized if several courts in several Member States were seized on the same day. COM thought that limitation to "same parties" was not appropriate here.

2a. Where these proceedings are pending at first instance, any court other than the court first seized may also, on the application of one of the parties, decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation thereof.

Article 76b

Actions before the Court of Justice of the European Union against decisions by the European Data Protection Board

(...)

Article 77

Right to compensation and liability³⁹

1. Any person who has suffered ⁴⁰damage⁴¹ as a result of a processing operation which is not in compliance⁴² with this Regulation shall have the right to receive compensation from the controller or processor⁴³ for the damage suffered.⁴⁴ **[A processor shall be liable for violations of this Regulation only where he has not complied with obligations of this Regulation specifically directed to processors or acted outside or contrary to lawful instructions of the controller or where he acted outside or contrary to lawful instructions of the controller**⁴⁵].

³⁹ IE and PL reservation. Several Member States (DE, NL and UK) have queried whether there was an EU concept of damage and compensation or whether this was left to Member State law. IT suggested specifying that these rules are to be applied according to national law, support from CZ, NL, RO and SI. COM thinks that it has to be left to ECJ to interpret these rules and concepts. FR scrutiny reservation; FR questioned the division of responsibilities and the link to Articles 24 and 25 and national law in this field as well as the principle of subsidiarity. IE asked from whom the data subject could seek compensation, since paragraphs 2 and 3 were contradictory. Nor UK liked the *joint* and *separately* responsibility and paragraphs 2 and 3 were contradictory. FI supported IE and UK and said that the processor had too much responsibility.

⁴⁰ DE, HU and SK suggested adding “material or immaterial/moral”. NO suggested clarifying this in a recital.

⁴¹ BE asked whether a violation of the principles of the Regulation was enough to constitute a damage or whether the data subject had to prove a specific damage (*obligation de moyens ou de résultat*). COM said that the data subject had to prove the damage.

⁴² COM reservation as the current draft (contrary to the initial version and the 195 Directive) no longer embodies the principle of strict liability.

⁴³ DE suggested restricting the possibility to seek compensation from the processor to cases where, in violation of point (a) of paragraph 2 of Article 26, the processor has processed personal data contrary to or in the absence of instructions from the controller. ES suggested adding a reference to ‘a right to exercise a direction action’, but this is already encompassed in the current draft.

⁴⁴ SE, supported by HU, considered that Article 77 was unclear and wanted to know whether both an economic and immaterial damage was covered: SE wanted as broad notion of damage as possible.

⁴⁵ Further to DE proposal. IE was opposed to the processor being held liable for not following instructions of the controller.

ALTERNATIVE:

Any person who has suffered ⁴⁶damage⁴⁷ as a result of a processing operation **by a controller or processor violating** ⁴⁸ with this Regulation shall have the right to receive compensation from the controller or processor⁴⁹ responsible for the damage suffered **as a consequence of the violation by that controller or processor.**⁵⁰ **[A processor shall be liable for violations of this Regulation only where he has not complied with obligations of this Regulation specifically directed to processors or acted outside or contrary to lawful instructions of the controller or where he acted outside or contrary to lawful instructions of the controller**⁵¹].

⁴⁶ DE, HU and SK suggested adding “material or immaterial/moral”. NO suggested clarifying this in a recital.

⁴⁷ BE asked whether a violation of the principles of the Regulation was enough to constitute a damage or whether the data subject had to prove a specific damage (*obligation de moyens ou de résultat*). COM said that the data subject had to prove the damage.

⁴⁸ COM reservation as the current draft (contrary to the initial version and the 1995 Directive) no longer embodies the principle of strict liability.

⁴⁹ DE suggested restricting the possibility to seek compensation from the processor to cases where, in violation of point (a) of paragraph 2 of Article 26, the processor has processed personal data contrary to or in the absence of instructions from the controller. ES suggested adding a reference to ‘a right to exercise a direction action’, but this is already encompassed in the current draft.

⁵⁰ SE, supported by HU, considered that Article 77 was unclear and wanted to know whether both an economic and immaterial damage was covered: SE wanted as broad notion of damage as possible.

⁵¹ Further to DE proposal. IE was opposed to the processor being held liable for not following instructions of the controller.

2. Where more than one controller or processor or a controller and processor are involved in the processing which gives rise to the damage, **the data subject may sue**⁵² each controller or processor, **in which case they** shall[, **under the conditions laid down in paragraph 1,**] be jointly and severally liable for the entire amount of the damage. This is without prejudice to recourse claims between controllers and/or processors^{53 54}.

ALTERNATIVE:

Where more than one controller or processor or a controller and processor are involved in the processing that gives rise to the damage, each controller or processor **shall be liable only for the damage caused by its actions and which arises from breach of an obligation imposed on it by the Regulation**⁵⁵. This is without prejudice to recourse claims between controllers and/or processors.

3. The controller or the processor **shall**⁵⁶ be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage⁵⁷.

ALTERNATIVE:

In case of recourse claims between controllers and/or processors, the controller or the processor **shall** be exempted from this liability, in whole or in part, if the controller or the processor proves that they are not responsible for the event giving rise to the damage.

⁵² HU suggestion.

⁵³ SI reservation: SI thought this paragraph could be deleted and left entirely to national law. SE pointed at the effect on business if both the controller and processor have an independent responsibility: it was necessary to clarify if it was a joint liability and if all controllers/processors needed to have caused the damage or was it enough to be involved in the processing. ES and HU meant that the starting point was that the data subject should be protected and be entitled to compensation. COM said that it was difficult for the data subject to know from where the damage had arisen.

⁵⁴ IE queried why the reference to Article 24(2) had been removed and then the second sentence had been added: what the purpose to bring a claim against all of them and then sort out the individual responsibility?

⁵⁵ UK proposal.

⁵⁶ Further to PL suggestion.

⁵⁷ DE and PL thought this paragraph needed to be further elaborated. DE in particular thought that the relationship to Article 39 needed to be further clarified. SI thought an arrangement for strict liability in the case of processing by public bodies should be inserted into this paragraph.

4. Court proceedings for exercising the right to receive compensation shall be brought before the courts with jurisdiction for compensation claims under national law of the Member State referred to in paragraph 2 of Article 75.

Article 78

Penalties

(...)⁵⁸

Article 79

General conditions for imposing administrative fines⁵⁹

1. Each supervisory authority⁶⁰ shall (...) ⁶¹ **ensure that the imposition of** administrative fines pursuant to this Article in respect of infringements of this Regulation referred to in Article 79a (...) *shall in each individual case be effective, proportionate and dissuasive.*⁶²
2. (...)

⁵⁸ This Article was moved to Article 79b. Scrutiny reservation by SK, RO and PT.

⁵⁹ DK reservation and EE scrutiny reservation on the introduction of administrative fines in the text as administrative fines – irrespective of their level – raise constitutional concerns. In DK and EE fines are decided by courts.

⁶⁰ IE suggested adding a reference to Article 51 and Article 51a.

⁶¹ It was pointed out (FI) that the empowerment for Member States to provide for administrative sanctions and measures was already covered by Article 53(1b)..

⁶² Moved from paragraph 2. FI thought that paragraph 2 was not necessary since paragraph 2a provided concrete content for the general wording of paragraph 2.

- 2a. Administrative fines shall⁶³, depending on the circumstances of each individual case, be imposed in addition to, or instead of, measures referred to in **points (a) to (f)** Article 53⁶⁴. When deciding whether to impose an administrative fine (...) ⁶⁵ and ⁶⁶deciding on the amount of the administrative fine in each individual case due regard shall⁶⁷ be **given**⁶⁸ (...) to the following:⁶⁹
- (a) the nature, gravity and duration of the infringement having regard to the nature scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them⁷⁰;
 - (b) the intentional or negligent character of the infringement,
 - (c) (...);
 - (d) action taken by the controller or processor to mitigate the damage suffered by data subjects;
 - (e) the degree of responsibility of the controller or processor having regard to technical and organisational measures implemented by them pursuant to Articles 23 and 30;
 - (f) any **relevant**⁷¹ previous infringements by the controller or processor;

⁶³ CZ, FR and UK and COM suggested to change *shall* to *may*.

⁶⁴ Some delegations thought that the corrective measures of Article 53 (1b) should be listed rather here.

⁶⁵ Deleted further to FI suggestion.

⁶⁶ Some delegations (EE, SK, PL) thought that aggravating circumstances should be distinguished from mitigating circumstances. SK suggested laying down exact thresholds (e.g. more than 2/3 of the maximum fine in case of aggravating circumstances). IT thought the possibility of EDPB guidance should be referred to here.

⁶⁷ UK suggested to insert *as appropriate*. DE was generally happy with the text since the list in was open and not all aspects needed to be considered. COM pointed at point (m) confirming that it was an open list.

⁶⁸ FI suggestion.

⁶⁹ PL and FR suggested that guidelines by the Board could be useful here or at least in a recital.

⁷⁰ Moved from point (c), further to FI remark that this was also an element of the gravity of the of the offence.

⁷¹ CZ suggestion.

- [(g) any financial benefits gained, or losses avoided, directly or indirectly from the infringement;]⁷²
- (h) the manner in which the infringement became known to the supervisory authority, in particular whether, and if so to what extent, the controller or processor notified the infringement⁷³;
- (i) in case measures referred to in point (b) and (c) of paragraph 1 and points (a), (d), (e) and (f) of paragraph 1b of Article 53, have previously been ordered against the controller or processor concerned with regard to the same subject-matter⁷⁴, *compliance with these measures* ;
- (j) adherence to approved codes of conduct pursuant to Article 38 or approved certification mechanisms pursuant to Article 39⁷⁵;
- (k) (...);
- (l) (...);
- (m) any other aggravating or mitigating factor applicable to the circumstances of the case.

3. (...) ⁷⁶

3a. (...) ⁷⁷

⁷² DK, ES, FR, FI and SI reservation. SI stated that a DPA was not equipped to assess this.

⁷³ CZ and SE were concerned that this factor might amount to a violation of the privilege against self-incrimination.

⁷⁴ This should also accommodate concerns regarding the privilege against self-incrimination by removing a general reference to co-operation in the investigation. IT thought this paragraph should refer more generally to previous incidents. DE and FR pleaded for its deletion.

⁷⁵ CZ, FR, EE and SI reservation: DE pointed out that non-adherence to approved codes of conduct or approved certification mechanisms could as such not amount to a violation of the Regulation. IT found this point problematic and said that if the chapeau was reworded point (j) could be deleted.

⁷⁶ COM reservation on deletion; linked to reservation on Article 79a.

⁷⁷ COM reservation on deletion.

- 3b. Each Member State may lay down the rules on whether and to what extent administrative fines may be imposed on public authorities and bodies established in that Member State⁷⁸.
4. The *exercise by the supervisory authority (...)*⁷⁹ of its powers under this Article shall be subject to appropriate procedural safeguards in conformity with Union law and Member State law, including effective judicial remedy and due process.

⁷⁸ DE would prefer to rule out this possibility in the Regulation. ES thought it should be provided that no administrative fines can be imposed on the public sector. FR strongly supported paragraph 3b.

⁷⁹ IE suggested adding a reference to Article 51 and Article 51a.

Article 79a
Administrative fines^{80 81}

1. The supervisory authority (...) may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] %⁸² of its total worldwide annual turnover⁸³ of the preceding financial year, on a controller who, intentionally or negligently:

⁸⁰ DK reservation on the introduction of administrative fines in the text as administrative fines – irrespective of their level – raise constitutional concerns. DE, EE, ES, IE and PT scrutiny reservation. FI and SI reservation. COM reservation on replacing ‘shall’ by ‘may’ and the deletion of amounts and percentages in paragraphs 1, 2 and 3. DE wanted the risk-based approach to be made clearer. DE thought that proportionality was important because Article 79a concerned fundamental rights/rule of law and deemed it disproportionate that a supervisory authority could impose a fine that the data subject was unaware of. DE said that it was necessary to set out the fines clearly and that the one-stop shop principle did not allow for exceptions being set out in national law. IE thought the gravity of offences was not sufficiently illustrated, *e.g.* infringement in para. 3(m), which according to IE is the most serious one. FR reservation: the strictness of the text may impinge on the independence of the DPA. ES also wanted to give flexibility to the DPA.

⁸¹ A majority of Member States (BE, CY DE, EE, ES, FI, IT, LV, LU, MT and NL) appear to be in favour of different scales of sanctions. COM referred to the Market Abuse Regulation with three levels of fines. DK, HU, IE, SE and UK were opposed to maintaining different sanctions scales. FR and PL did not favour it, but could accept it. SI said that it was impossible to have amounts in the Article. In contrast NL wanted to set out amounts.

⁸² EE did not consider it appropriate to set out sanctions in percentage because the sanction was not predictable. PT considered that there should be minimum penalties for a natural person and that for SMEs and micro enterprises the volume of the business should not be looked at when applying the fines (this factor should only be applicable for multinationals). PL thought that administrative fines should be implemented in the same way in all MS. PL said that the fines should be flexible and high enough to represent a deterrent, also for overseas companies. ES saw practical problems with worldwide fines. UK noted that the levels of fines in the EP report were far too high.

⁸³ UK commented that *turnover* was used in competition law and asked whether the harm was the same here. EE asked how the annual turnover was connected to the sanction. SI thought that compared to competition law where the damage concerned the society as a whole, data protection concerned private infringements. COM said that both competition law and data protection concern economic values, whereas data protection protects values of the data subject. COM further said that the fines must be dissuasive and that it was necessary to refer to something, *e.g.* percentage but that it was also necessary with a sufficiently broad scope to take into account the specificities of the case. UK meant that *name and shame* would be a more efficient practice than fines. UK further said that high fines would entail two problems: they would be challenged in court more often and controllers might get less help to verify a potential breach. DE, supported by FR, meant that the fines set out in Article 79a were only the maximum level and that question of fines could be submitted to the Ministers in June JHA Council. COM agreed that the Article only set out maximum fines and that the companies themselves would provide the amounts of the turnover.

(a) does not respond within the period referred to in Article 12(2) to requests of the data subject;

(b) charges a fee in violation of the first sentence of paragraph 4 of Article 12.

2. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [...] EUR, or in case of an undertaking [...] % of its total worldwide annual (...) turnover of the preceding financial year, on a controller or processor who, intentionally or negligently:⁸⁴

(a) does not provide the information, or (...) provides incomplete information, or does not provide the information [timely or] in a [sufficiently] transparent manner, to the data subject pursuant to Articles 12(3), 14 and 14a;

(b) does not provide access for the data subject or does not rectify personal data pursuant to Articles 15 and 16 or does not comply with the rights and obligations pursuant to Articles 17, 17a, 17b, 18 or 19;

(c) (...);

(d) (...);

(e) does not [or not sufficiently] determine the respective responsibilities with joint controllers pursuant to Article 24;

(f) does not [or not sufficiently]⁸⁵ maintain the documentation pursuant to Article 28 and Article 31(4).

(g) (...)

⁸⁴ IT considered that paragraphs 2 and 3 were very generic and only described the infringements but that the scale of gravity was not well defined. IT asked for a better categorisation of the infringements.

⁸⁵ IE, supported by SI, pointed it that a number of the terms used here (such as "sufficiently", "timely" and "incomplete") were so vague that they were not compatible with the *lex certa* principle. DE agreed with IE and added that it was a problem of objective of the provisions: on the one side the need for the controller to know what the rules are and on the other side the flexibility for the DPA.

3. The supervisory authority [competent in accordance with Article 51] may impose a fine that shall not exceed [...] EUR or, in case of an undertaking, [...] % of its total worldwide annual turnover of the preceding financial year, on a controller or processor who, intentionally or negligently:
- (a) processes personal data without a (...) legal basis for the processing or does not comply with the conditions for consent pursuant to Articles 6, 7, 8 and 9;
 - (b) (...);
 - (c) (...);
 - (d) does not comply with the conditions in relation to (...) profiling pursuant to Article 20;
 - (e) does not (...) implement appropriate measures or is not able to demonstrate compliance pursuant to Articles 22 (...) and 30;
 - (f) does not designate a representative in violation of Article 25;
 - (g) processes or instructs the processing of personal data in violation of (...) Articles 26;
 - (h) does not alert on or notify a personal data breach or does not [timely or] completely notify the data breach to the supervisory authority or to the data subject in violation of Articles 31 and 32;
 - (i) does not carry out a data protection impact assessment in violation of Article 33 or processes personal data without prior consultation of the supervisory authority in violation of Article 34(1);
 - (j) (...);
 - (k) misuses a data protection seal or mark in the meaning of Article 39 or does not comply with the conditions and procedures laid down in Articles 38a and 39a;

- (l) carries out or instructs a data transfer to a recipient in a third country or an international organisation in violation of Articles 40 to 44;
- (m) does not comply with an order or a temporary or definite ban on processing or the suspension of data flows by the supervisory authority pursuant to Article 53(1) or does not provide access in violation of Article 53(2).
- (n) (...)⁸⁶
- (o) (...).

3a. [If a controller or processor intentionally or negligently violates several provisions of this Regulation listed in paragraphs 1, 2 or 3, the total amount of the fine may not exceed the amount specified for the gravest violation.]⁸⁷

4. [The Commission shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of adjusting the maximum amounts of the administrative fines referred to in paragraphs 1, 2 and 3 to monetary developments, taking into account the criteria referred to in paragraph 2 of Article 79.]⁸⁸

5. Where the national law of a Member State requires that another authority than the supervisory authority is competent to impose fines referred to in this article , the respective Member State shall provide that that authority shall be empowered to impose such fines upon request of the supervisory authority.

⁸⁶ IT wanted to reinstate failure to cooperate with the DPO. IE that thought that this was a subjective infringement.

⁸⁷ PL wanted to keep paragraph 3a.

⁸⁸ CZ, DE, NL and RO reservation. NL that thought that guidelines from the EDPB could solve the problems on the amounts. CZ wanted to delete the paragraph and thought that the DPA could set out the amounts.

Article 79b

Penalties⁸⁹

1. For infringements (...) of this Regulation in particular for infringements which are not subject to administrative fines pursuant to (...) Article 79a Member States shall⁹⁰ lay down the rules on penalties applicable to such infringements and shall take all measures necessary to ensure that they are implemented (...). Such penalties shall be effective, proportionate and dissuasive.
2. (...).
3. Each Member State shall notify to the Commission those provisions of its law which it adopts pursuant to paragraph 1, by the date specified in Article 91(2) at the latest and, without delay, any subsequent amendment affecting them.



⁸⁹ AT, BE, DE, DK, EE, ES, FR, IT, PL and PT and SK scrutiny reservation. COM explained that infringements not listed in Article 79a were those under national law, referred to in Chapter IX, for example infringements in employment law and relating to freedom of expression. In that way Article 79b is complementary to the list in Article 79 and does not exclude other penalties. IT thought it was better to delete the Article but lay down the possibility to legislate at national level. FR reservation on the imposition of criminal penalties. DE in favour of referring *expressis verbis* to criminal penalties.

⁹⁰ BE and EE reservation.